

DECISION



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PL-1
Mr. H. G. Funtner
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-195251.2

DATE: December 17, 1979

MATTER OF: Prestex, Inc. P. 3502

DIGEST:

1. Bid received on total small business set-aside wherein sole bidder indicated that it, as regular dealer, would not supply materials manufactured by small business concerns was determined properly to be nonresponsive due to failure to submit binding promise to meet set-aside requirement, even though allegedly small business firms were listed in "Place of Performance" clause.
2. Nonresponsive bid may not be considered for correction regardless of circumstances since to permit this would be tantamount to permitting submission of new bid.
3. While clause permitting bidders to make their proposed place(s) of contract performance confidential information ("except as inconsistent with existing law") may lessen or negate ability of competing bidders to challenge acceptability of other bids, contrary to fundamental concept of full and free competition, no objection will be made to award under resolicitation since none of bidders participating on resolicitation protested use of clause. However, recommendation is made that provision for confidentiality be deleted in future.

Invitation for bids (IFB) No. DLA100-79-B-0593 was issued as a 100-percent small business set-aside for the procurement of cloth. Prestex, Inc. (Prestex), the sole bidder, represented in its bid that it was a small business and that it was bidding as a regular dealer, not as a manufacturer. It also represented that the cloth "will not be manufactured or produced by a small business concern * * *," and it indicated,

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[Protest INVOLVING Small Business Set-Aside Provision]

as required in the IFB "Place of Performance" clause, the names of the firms (and their locations) which would manufacture the cloth. Because of the representation that the cloth "will not" be manufactured by a small business, the contracting officer rejected the Prestex bid as being nonresponsive to the small business set-aside requirement. Consequently, he canceled the invitation and readvertised the procurement. Prestex protested these actions.

It is the position of the contracting officer that Prestex did not bind itself to furnish cloth manufactured by a small business concern since it represented otherwise and since either the size status of the firms (assuming they are now small businesses) listed by Prestex in the "Place of Performance" clause could change after award and Prestex could not be required to change firms or Prestex could engage a large business as a manufacturer after award and no means would exist to compel Prestex to provide small business-manufactured cloth. Second, it is believed that a bid that can be read as one offering to supply small business-manufactured cloth (due to the firms listed by the bidder as the manufacturers) and as one offering to supply large business-manufactured cloth (due to the representation) is ambiguous and should be rejected. To do otherwise, it is noted, would permit the bidder after bid opening to choose the bid interpretation it desired and thereby determine whether or not it would accept an award.

Prestex maintains that its faulty representation was caused by a typing error and, as such, is a minor informality which may be corrected. It believes that the "Place of Performance" clause should govern as the more definitive of the two and as the one referring to bid responsiveness if it is not complied with. That clause provides that the bidder may not change its manufacturing suppliers from those listed in its bid without the permission of the contracting officer. Thus, since the firms it listed are small businesses, it has obligated itself to provide small business-manufactured cloth. As to a possible change in the small business status of those firms, Prestex states that the time to determine their status is at the time of bid opening and contract award. Any change--which

Prestex believes is hardly likely--after award would be irrelevant. In conclusion, Prestex believes that since it obligated itself to provide cloth manufactured by the listed small business concerns and since it would not have bid on the procurement had it not intended to accept an award, there can be no ambiguity in its bid, and it should be given the award. It notes that no other firm would be prejudiced if it were permitted to correct the wording in its bid since it was the sole bidder on the procurement.

We believe that the Prestex bid was found properly to be nonresponsive. While Prestex may have had every intention of meeting the small business set-aside requirement, the fact remains that Prestex represented that it was a regular dealer and that the cloth would not be manufactured by a small business. The failure of Prestex to express its intention in its bid and to thereby submit a binding promise to meet the small business set-aside requirement was sufficient to render the bid nonresponsive, something which now may not be corrected, since to permit a bidder to make its nonresponsive bid responsive after bid opening would be tantamount to permitting the submission of a new bid. Jack Young Associates, Inc., B-195531, September 20, 1979, 79-2 CPD 207. Even though Prestex was the sole bidder, to allow Prestex to alter its nonresponsive bid would be injurious to other potential bidders who might bid--as was done subsequently--on the resolicitation of the procurement.

Finally, we do not view Prestex's completion of the "Place of Performance" clause as obligating it to comply with the small business requirement in view of the contrary representation in the clause intended for that purpose. At best, Prestex's completion of the former clause created an ambiguity which required rejection of the bid as nonresponsive. M. A. Barr, Inc., B-189142, August 3, 1977, 77-2 CPD 77.

Accordingly, the protest is denied.

We note that in the "Place of Performance" clause bidders were permitted to make their proposed place(s) of contract performance confidential information, and the Government would "maintain information so submitted except as inconsistent with existing law." We believe

that the granting of any confidentiality to this information is contrary to the fundamental concept of full and free competition since the confidentiality of the information might seriously lessen or even negate the ability of bidders to challenge the acceptability of other bids. For example, see Defense Acquisition Regulation § 2-404.4 (1976 ed.). However, since the participants to the resolicitation have not protested its use, we will not object to an award under the resolicitation. However, we are bringing the matter to the attention of the Department of Defense with the recommendation that it be deleted from future solicitations. 5

Milton J. Fowler
For The Comptroller General
of the United States